IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMM.FOR JUDGMENT NO. 509 OF 2003

IN

SUMM.SUIT NO.1396 OF 2002

Pankaj Dhanji Chheda .. Plaintiff

versus

M/s Sai Rachna Developers & ors .. Defendants

...

Mr.L.H.Rambhia for Plaintiff.

Mr.Mukesh Aiya i.b J.Brijlani for Defendants

CORAM : D.G. KARNIK, J

DATED : 6th April 2005.

P.C:-

1. This Summons for Judgment is taken out by the plaintiff in its suit for recovery of the principal of Rs.38,03,705/- and interest thereon.

2. The defendant no.1 is a partnership firm and defendant nos. 2 and 3 are its partners. On 8th

March, 1995 the defendants entered into an agreement with Kamlakar Bhoir and Jayant Vaithy for purchase/development of their property bearing Survey No.59 CTS No.739 of Nahur, Kurla. The defendants thereafter, represented to the plaintiff that they developing the said property and offered to the plaintiff on ownership basis two industrial units of about 720 sq ft each at the rate of Rs.1800/- per sq.ft. The plaintiff paid to the defendants a sum of Rs.25,92,000/- as deposit towaards the purchase of the two industrial galas which was agreed to be constructed and sold by the defendants. The defendants could not develop the said property as they found that title of the vendors was not marketable and there were litigations. The defendants therefore agreed to repay to the plaintiff a sum of Rs.25,92,000/- together with past interest at 2.25 % p.m. by 31st March 1999. Accordingly the defendants executed a written agreement on 25th September, 1998 agreed to pay the amount of Rs.38,03,705/- inclusive of interest up to 31st August, 1998. The defendants further agreed that they would pay interest at 1.75 % p.m.from 1st September, 1998 up to payment. As the defendants failed and neglected to make the payment by 31st March 1999 as agreed, the plaintiff has filed

this suit for recovery of the money due under the written agreement dated 25th September, 1998 executed by the defendants in his favour.

3. By filing an affidavit in reply dated 29th March 2005 the defendants have prayed for unconditional leave to defend the suit. In the affidavit in reply the defendants have not denied their signature on the agreement dated 25th September 1998 nor have they denied its execution. The defendants however contend that the plaintiff is not entitled to a decree firstly because the suit is barred by limitation and secondly, that the interest has not been properly calculated. The defendants also contend that the defendants had given power of attorney to the brother of the plaintiff on 21st August, 1999 authorising him to sell the proposed building/buildings to be constructed on the said land and therefore the defendants are not liable to repay the money to the plaintiff.

4. As regards the limitation, by an agreement dated 25th September, 1998 the defendants had agreed to pay to the plaintiff a sum of Rs.38,03,705/- by 31st March 1999. Therefore cause of action for filing of the suit arose only after non payment by the defendant on

31st March,1999. The suit has been filed on 1st April, 2002. 31st March 2002 being a Sunday and a holiday for the court the suit which has been filed on 1st April, 1999 is within the period of limitation. That apart, in the reply to the plaintiff's Advocate's notice the defendants by their advocate's reply dated 10th April, 1999 have not only acknowledged their liability but have agreed to pay the balance money. In para 8 the defendants' advocate has replied : " my clients state that my clients will have no intention to go back from the terms of the said agreement. However, my clients never expected that the litigations would go beyond March 1999 and my clients agreed to clear the dues of your client by 31st March 1999. My clients state that my clients are trying from all angles to bring an end to the pending litigation and their marketable title to the property and arrange to clear the dues of your client in the shortest possible time. "

5. Thus, the defendants have acknowledged their liability and unequiviocally promised repayment by their advocate's reply dated 10th April, 1999. The period of limitation would therefore stand extended under setion 18 of the Limitation Act and suit is

filed within three years from 10th April, 1999. Therefore, the defence that the suit is barred by limitation has no substance.

6. It is true that the defendants have given a power of attorney to the plaintiff's brother on 21st August, 1999 authorising him to sell the proposed building/buildings/units in the building and execute the agreements for sale. By the said power of attorney, the defendants had also authorised the brother of the plaintiff to repay the debts already incurred by the defendants meaning thereby that they had authorised the plaintiff's brother to pay the debt due to the plaintiff also. However, the power of attorney merely authorises the brother of the plaintiff to sell units of the buildings to be constructed on the property and pay the debts. It does not amount to payment of debts. It is not the case of the defendants that the plaintiff's brother has sold any units and realised any consideration and repaid the dues of the plaintiff. Therefore, the debts which was contracted by the defendants and agreed to be repaid under the agreement dated 25th September, 1998 still remains to be paid. Therefore, assuming the contention of the defendants to be true

that the power of attorney was given at the instance of the plaintiff, that is only an authority given to the plaintiff's brother to repay the defendant's debts by selling the units proposed to be constructed. That authority has not been used by the plaintiff's brother. It is an admitted position that litigation in respect of the said property is still not over. In the circumstances, the plaintiff's brother could not have sold the units proposed to be constructed on the property on account of the litigation. In the circumstances, giving of the power of attorney to the plaintiff's brother does not amount to discharge of the defendants.

7. The defendants lastly contended that interest has not been properly computed in as much as original amount paid by the plaintiff was only Rs.25,92,000/- and amount of Rs.38,03,705/- agreed to be paid by the defendants to the plaintiffs was inclusive of interest up to 31st August,1998. It is further submitted that future interest at 1.75 % agreed to be paid by the defendants from 1st September, 1998 on the principal sum of Rs.25,92,000/- and not on the total amount of Rs.38,03,705/- which was inclusive of interest up to 31st August, 1998. . Reading of the agreement dated

25th September, 1998 as a whole shows that the amount of interest up to 31st August, 1998 was capitalised and a lump sum amount of Rs.38,03,705/- was agreed to be paid by the defendants with interest at 1.75 % p.m.thereon from 1st September, 1998. The plaintiff is therefore entitled to interest on the total amount of Rs.38,03,705/- from 1st September, 1998 as agreed by the defendants themselves. However, assuming for the sake of arguments that interest ffrom 1st September, 1998 would be payable only on the principal sum of Rs.25,92,000/- as contended by the defendants the future interest at the most would be reduced from Rs.23,96,225/- as claimed in the schedule to the plaint, to approximately Rs.14,00,000/- if calculated on the principal sum of Rs.25,92,000/-. No defence is available to the defendants regarding non payment of the interest at least to the extent of Rs.14,00,000/-. In the circumstances, the defendants can be granted conditional leave subject to depositing in court the agreed amount of Rs.38,03,705/- and the reduced interest of Rs.14,00,000/-. Leave regarding payment of the balance amuont of interest to the extent of Rs.9,96,295/- can be unconditionaly granted to the defendants. Accordingly, I pass the following order :

" The defendants are granted unconditional leave to defend the suit to the extent of claim of interest to the extent of Rs.9,96,295/-. The defendants are granted conditional leave to defend the suit regarding rest of the claim of the plaintiff subject to their depositing in court the agreed amount of Rs.38,03,705/- and interest of Rs.14,00,000/-. The principal amount of Rs.38,03,705/- to be deposited within a period of eight weeks and interest of Rs.14,00,000/- within sixteen weeks. On deposit of the money, the plaintiff shall be entitled to withdraw the agreed amount of Rs.38,03,705/- by furnishing security to the satisfaction of the Prothonotary and Senior Master. The amount of interest of Rs.14,00,000/-, if deposited, shall be invested in nationalised bank of the choice of the defendants if such choice is indicated at the time of deposit or else in the Bank of India, Main Branch,Fort, Mumbai initially for a period of 13 months to be renewed from to time to time till disposal of the suit."

8. On deposit of the money suit shall stand transferred to the list of commercial causes. The defendants shall file the written statement within one month.

D.G.KARNIK, J